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# THE NEW REPRODUCTIVE TECHNOLOGIES AND THE LAW: A ROMAN CATHOLIC PERSPECTIVE\*

*William Joseph Wagner\*\**

In the next several years, the new reproductive technologies will, for better or worse, affect the civil law governing society's most basic relationships and the rights and duties that accompany them. As lawmakers deliberate over the social choices required by technological developments in human reproduction, the soundness of their decisions will depend on their understanding of the good that is at risk, and on their commitment to the law's role in defending it. In view of the fundamental nature of the societal relationships implicated, who will deny that much currently depends on the quality of lawmakers' decisions?

This article draws on the resources of the Roman Catholic tradition to assist in establishing the basis for a sound legal response to the new technologies. In Roman Catholic circles, discussion thus far has been dedicated, in the main, to placing the facts of the new technologies in view, and to stating and applying principles relevant to their moral evaluation, but this article will move from the moral implications of the new technologies *per se*, to the question of society's response to them through the enactment of civil law.

The Vatican's *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation* stressed the importance of this latter question. Its last section is entitled: "Moral and Civil Law: The Values and Moral Obligations That Civil Legislation Must Respect and Sanction."<sup>1</sup> Concern with the civil law, both in this article and in the Vatican *Instruction*, reflects the exceptional sense of moral urgency which lawmakers, who face the rapidly

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1. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY*, reprinted in POPE JOHN XXIII MEDICAL-MORAL RESEARCH AND EDUCATION CENTER, *ETHICS & MEDICS* 20-21 (Supp. Apr. 1987) [hereinafter *VATICAN INSTRUCTION*].

expanding fact of the reproductive technologies, are now experiencing.<sup>2</sup> It also reflects the intrinsic dynamic of Catholic moral principles. These affirm the social nature of the human person and the essential role of law in the pursuit of the common good.<sup>3</sup> Lawmakers need the assistance of the Church, with its unmatched store of experience in the service of humanity, and the Church needs to speak if it is to remain true to its vocation.

This article's goal is a generic understanding of those human goods which the new reproductive technologies place at risk and which it falls within the province of the civil law to protect. The article pursues this goal for the purpose of justifying and prescribing the appropriate scope of the civil law's intervention in this new area. The warrants supporting its conclusions derive from the Roman Catholic tradition. They are, however, intended as meaningful to others, and should be of assistance in contributing to consensus within society as a whole.

In addition to generic warrants and principles, the situation brooks no delay in the formulation of concrete policy recommendations. Concrete recommendations are the focus of the public debate, and through them Catholics are most effective in communicating their principled commitments to others within the public realm. For this reason, my conclusions will have the form of concrete public policy recommendations.

As far as the short scope of the article allows, I will account for how I traverse the divide between primary moral warrants and concrete legal proposals. Catholicism lays importance on careful distinctions at this level. The Church acknowledges that the rational analysis and prudent judgment of legal proposals presupposes, in addition to valid moral principles, knowledge of the facts at issue, the broader characteristics of the culture, and the structure of the existing system of positive law.<sup>4</sup> The proposals I advance are intended as authentic expressions of Roman Catholic principles. They are offered within what is intended as an accurate framework of knowledge

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2. See, e.g., *Alternative Reproductive Technologies: Implications for Families and Children*, Hearing Before the House Select Committee on Children, Youth, and Families, 100th Cong., 2d Sess. (1987) [hereinafter *Alternative Reproductive Technologies*]; *Surrogacy Arrangements Act of 1987: Hearings on H.R. 2433 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. Sess. (1987).

3. PASTORAL CONSTITUTION OF THE CHURCH IN THE MODERN WORLD § 74 (1965), reprinted in *THE DOCUMENTS OF VATICAN II* at 283-85 (W. Abbot & J. Gallagher eds. 1966) [hereinafter *PASTORAL CONSTITUTION*].

4. *Id.*; JOHN XXIII, *PACEM IN TERRIS* § 67-69 (1963), reprinted in *RENEWING THE EARTH: CATHOLIC DOCUMENTS ON PEACE, JUSTICE AND LIBERATION* 124, 141-42 (D. O'Brien & T. Shannon eds. 1977) [hereinafter *JOHN XXIII*].

about the new technologies and about the culture and legal system of the United States.

# I. SUMMARY: THE FACTS OF THE NEW REPRODUCTIVE TECHNOLOGIES AND THE MORAL EVALUATION OF THE CHURCH

## *The Facts of the New Reproductive Technologies*

An synthesis of the facts of the new reproductive technologies is a necessary preliminary to my analysis. These facts lend themselves to synthesis in two phases: 1) a description of the new technologies; and 2) a description of the societal consequences which flow from the new technologies. Both separate descriptions supply a needed foundation for the normative analysis which the paper undertakes.

### *1. The New Technological Means of Reproduction*

The new reproductive technologies with which the law is likely to be concerned are those bringing about conception by "noncoital" means, i.e. by means other than the conjugal act.<sup>5</sup> In the classification of modes of noncoital reproduction, methods which bring about conception within a woman's body are distinguished from those which bring about conception at an "extracorporeal" site. The former are known as "*in vivo*", and the latter as "*in vitro*".<sup>6</sup> Some of these techniques are already extensively practiced, others have been employed with success in selected cases, yet others are, for the time being, still only a hypothetical possibility.<sup>7</sup>

Of the *in vivo* means, the most firmly established is Artificial Insemination

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5. The Catholic Church sees the distinction between "coital" and "noncoital" reproduction as morally significant. The Church teaches that technical "assistance" to conception through coitus may be morally licit, but that technical substitution for coitus is not. PIUS XII, ALLOCUTION TO THE SECOND WORLD CONGRESS ON FERTILITY AND STERILITY 3 THE POPE SPEAKS 194-95 (1956); see also VATICAN INSTRUCTION *supra* note 1, at 18. The public policy discussion generally accepts "noncoital" human reproduction as a meaningful category calling for a public policy response. See S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 223 (1987).

6. For an illustration of the use of these terms, see Robertson, *Embryo, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 949 (1986).

7. Because of the rapid advance of technology, policy must be formulated with respect to projections about future states of affairs; otherwise, the policy may be incomplete or even irrelevant practically upon coming into existence. This explains, for example, the approach of the Warnock Committee, which made recommendations about both existing and hypothetical technologies. DEPARTMENT OF HEALTH & SOCIAL SECURITY (U.K.), REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (M. Warnock Chair 1984) [hereinafter WARNOCK COMMITTEE].

(AI). This method may employ gamete donation by the husband (AIH) or by a donor (AID),<sup>8</sup> and it may be performed with or without the mediation of physician.<sup>9</sup> The woman conceiving by AID is usually, but not always married.<sup>10</sup> Where the AID conception is mediated by physician, gamete donation is nearly always by a medical student in exchange for a fee.<sup>11</sup> In the United States, as many as 20,000 babies born each year have been conceived by AI.<sup>12</sup> Since becoming widely practiced in about 1950, this method has resulted in a total of more than 250,000 U.S. births.<sup>13</sup>

Another much newer, rapidly growing means of noncoital *in vivo* reproduction is Surrogate Motherhood. This procedure brings about *in vivo* conception by AI in a woman other than the male gamete donor's spouse, pursuant to an agreement that the woman will, at birth, transfer exclusive custody of the resulting child to the donor and his spouse.<sup>14</sup> Such arrangements differ from AID, in that the genetic mother, and not father, is the gamete donor, and she donates gestational "services" as well as gamete. The first publicized case of surrogate motherhood in the United States occurred nearly nine years ago.<sup>15</sup> Over 800 babies have been born in the United States pursuant to Surrogate Motherhood arrangements, including well known "Baby M".<sup>16</sup> There has been a proliferation of brokers and professional intermediaries who structure and channel such arrangements.<sup>17</sup>

Unless either procedure incidentally includes treatment of male infertility, AI and Surrogate Motherhood require no advanced technology. Both, in fact, can be accomplished without mediation of a physician. Each year numbers of so-called "baster babies" are conceived in the United States, by

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8. S. ELIAS & G. ANNAS, *supra* note 5, at 227. Because AIH involves neither third-party gamete donation nor an extracorporal embryo, it probably does not call for a civil law response beyond the scope of the normal regulation of medical treatment. I, therefore, restrict my concrete policy recommendations concerning AI to AID.

9. Robertson, *supra*, note 6, at 1004-05.

10. B. ASHLEY & K. O'ROURKE, *HEALTH CARE ETHICS* 286 (2d ed. 1982).

11. S. ELIAS & G. ANNAS, *supra* note 5, at 228.

12. Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, 70 A.B.A. J. 50, 50 (1984). Some estimate a somewhat lower figure. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S.I.L.L. U. L.J. 147, 148.

13. S. ELIAS & G. ANNAS, *supra* note 5, at 227.

14. Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* 96 YALE L.J. 187, 188 n.5 (1986).

15. Surrogacy Arrangements Act, *supra* note 2 (Testimony of Richard Levin, President of Surrogate Parenting Associates, Inc.).

16. As of 1985, an estimated 600 surrogate births had occurred. Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J. L. & SOC. PROBS. (1986). At present, an estimated 100 births occur a year. *Reproductive Technology Debated*, Wash. Post, Sept. 9, 1986, at I3. The total to date should be well over 800.

17. Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185, 199 (1985). Krause points out that these middlemen reap most of the profit in the surrogate arrangement.

means of home-induced artificial inseminations.<sup>18</sup> The explanation of AI and Surrogate Motherhood is apparently connected more with social change than technological innovation.

A new, as yet little-used *in vivo* procedure of noncoital reproduction, requiring advanced technology, is Surrogate Embryo Transfer (SET).<sup>19</sup> The first live birth following SET occurred four years ago.<sup>20</sup> The procedure entails *in vivo* conception by AID; subsequent removal the resulting embryo by lavage; and Embryo Transfer (ET) to the womb of another for gestation.<sup>21</sup> The intended gestator is generally presumed to be the infertile spouse of the male gamete donor. Along with her husband, she usually intends to have custody of the resulting child.<sup>22</sup> If the procedure were varied to include AIH or marital intercourse rather than AID, it could be used to allow a fertile woman, who is unable or unwilling to carry a child, to engage another woman to gestate her child, while intending to regain custody of the child at birth. This latter arrangement can, more aptly than Surrogate Motherhood, be termed "womb rental".

Turning from *in vivo* to *in vitro* procedures for noncoital reproduction, the simple case of *In Vitro* Fertilization (IVF) is conception *in vitro* by AIH, with ET to the genetic mother for gestation.<sup>23</sup> The first live birth resulting from this use of IVF occurred ten years ago.<sup>24</sup> There have now been over 2,000 IVF births worldwide.<sup>25</sup> Under present circumstances, the woman gestating a baby conceived by IVF generally is both genetic mother and the spouse of the male donor. But, IVF can be completed by means of AID, so that the male gamete donor may be other than the woman's spouse.<sup>26</sup>

IVF can also be varied so that the donation of the ovum (Ovum Donation) for IVF conception results in ET to another for gestation.<sup>27</sup> If the transfer is to the spouse of the male gamete donor, then custody of the resulting child will, in general, be intended for the gestator and her husband, the genetic

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18. See, e.g., *Artificial Insemination and AIDS*, Wash. Post, Health Mag., Jan. 5, 1988, at 17, col. 1) (discussing the self-administered artificial insemination of Lesley Northrup, an Episcopal priest).

19. S. ELIAS & G. ANNAS, *supra* note 5 at 230.

20. *Infertile Woman Has Baby Through Embryo Transfer*, N.Y. Times, Feb. 4, 1984, at 16.

21. S. ELIAS & G. ANNAS, *supra* note 5, at 230.

22. *Id.*; Robertson, *supra* note 6, at 950-51; WARNOCK COMMITTEE, *supra* note 7, at 39.

23. WARNOCK COMMITTEE, *supra* note 7, at 29.

24. The baby, Louise Brown, was born on July 25, 1978. D. DEMARCO, IN MY MOTHER'S WOMB 143 (1987).

25. *Id.*

26. This would be the case where the couple's infertility has the husband's infertility as a contributing cause.

27. WARNOCK COMMITTEE, *supra* note 7, at 35.

father. In such case, the ovum donation is more strictly analogous to AID, than is either Surrogate Motherhood or SET. If the transfer is to a woman who is neither the ovum donor nor the wife of the sperm donor, the transaction is part of an Embryo Donation and custody of the resulting child is probably intended for a couple with whom the child will have no genetic relationship.<sup>28</sup>

In other cases, the ovum donor might herself wish custody, at birth, of the child resulting from IVF and ET to another. In this event, she would presumably also be the spouse of the male gamete donor. The woman receiving the embryo transfer (ET) and gestating the child would be genetically unrelated to the child and maritally unrelated to its father. This arrangement, again more aptly than Surrogate Motherhood, would be described as "womb rental".<sup>29</sup>

IVF, in any of these applications, can be combined with the use of Frozen Embryos. The first live birth following the freezing of the embryo occurred two years ago.<sup>30</sup> Freezing the embryo permits delay between IVF and ET. This delay can be utilized for the convenience of the candidate for gestation, whether the child's genetic mother or another; for efficiency in the procedure; for avoidance of medical risks; or for the occurrence of brokerage functions.<sup>31</sup> During the period of delay, the frozen embryo is maintained in an Embryo Bank or "storage authority."<sup>32</sup>

A hypothetical additional technological means of reproduction is IVF combined with *in vitro* gestation. This hypothetical possibility, which would result in the "test tube baby" of Aldous Huxley's *Brave New World*, is known as ECTOGENESIS.<sup>33</sup> Other hypothetical possibilities include asexual reproduction through CLONING, NUCLEUS SUBSTITUTION, and PARTHENOGENESIS.<sup>34</sup> These methods would be employed for more complete mastery over the genetic make-up of individual embryos.<sup>35</sup>

## 2. *A Description of the Societal Consequences of the New Reproductive Technologies*

As will be shown below, Catholicism understands the law as especially

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28. *Id.* at 39; Robertson, *supra* note 6, at 950.

29. Robertson, *supra* note 6, at 950 n.34.

30. Note, *Frozen Embryo: Moral, Social and Legal Implications* 59 S. CAL. L. REV. 1079, 1082 n.20 (1986); *First Baby Born of Frozen Embryo*, N.Y. Times, April 11, 1984, at A16, col. 4.

31. *Id.* at 1083-86.

32. WARNOCK COMMITTEE, *supra* note 7, at 55.

33. *Id.* at 71-73.

34. *Id.*

35. *Id.*

concerned with the consequences that human actions have for the social order. The Vatican *Instruction* rightly notes that the societal consequences of the new reproductive technology cannot yet fully be foreseen, one reason being that the response of the civil law is, for the most part, still pending, and that this response will be critical in deciding the extent and nature of such consequences. Nonetheless, two parallel sets of consequences or potential consequences flowing from the practice of the new reproductive technologies are already clear. They are: 1) the emergence of unprecedented risks to the embryo; and 2) the breakdown and redefinition of familial relationships. These two parallel effects of the new reproductive technologies can be considered separately.

### *Unprecedented Risks to the Embryo*

All *in vitro* and some *in vivo* methods of noncoital reproduction expose the embryo to a period of "extracorporeal" existence.<sup>36</sup> Extracorporeal existence exposes the human embryo to unprecedented risk during a critical phase of development. In part, the threatened harms are physical: the extracorporeal embryo is subject to harm through accident; nontherapeutic (eugenic) treatment; nontherapeutic experimentation; commercial exploitation; and planned destruction (wastage).<sup>37</sup> Existing experimental and commercial uses to which embryos could be put open up possible vistas of routine mass destruction.<sup>38</sup>

Threatened harms also include ones of an intangible kind to the moral dignity of the embryo. Because it is deprived of the moral, legal, and physical protection of a sheltering relationship with the gestational mother, the embryo is exposed to the risk of fundamental removal from personal relationship with others, and may even be treated as a form of chattel. It may be placed in long-term frozen storage.<sup>39</sup> It may be sold as property possibly for gestation, but also for experimentation or commercial exploitation.<sup>40</sup> If it dies during its extracorporeal existence, its remains may be sold for these latter purposes.<sup>41</sup>

When larger societal trends are compared, the vulnerability of the extracorporeal embryo to physical injury and destruction converges with the

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36. Smith, *Intimations of Life: Extracorporeality and the Law*, 21 GONZ. L. REV. 395 (1986).

37. VATICAN INSTRUCTION, *supra* note 1, at 10-13.

38. WARNOCK COMMITTEE, *supra* note 7, at 71.

39. *Id.* at 54.

40. Robertson, *supra* note 6, at 1021; WARNOCK COMMITTEE, *supra* note 7, at 71.

41. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28, 32 (1986).



similar vulnerability of the aborted embryo<sup>42</sup> or fetus and the patient who is denied appropriate treatment or care, because of another's assessment of the "quality" of his life.<sup>43</sup> The moral vulnerability of the extracorporeal embryo to treatment as "chattel" converges with a distinct set of trends, including proposals to utilize living anencephalic babies as a source of organs for transplant<sup>44</sup> and to use living aborted fetuses as a source of organs for transplant or for nontherapeutic experimentation.<sup>45</sup> This second trend, more fundamentally than the first, subjugates one human being for the uses of another.

### *Breakdown and Redefinition of Familial Relationships*

Familial status as "parent", "child of a parent", and "spouse" has, until now, been fundamental for social identity and for establishing core legal rights and duties not generally subject to economic markets or routine governmental limitation.<sup>46</sup> Prior to the emergence of the new technologies, attribution of family status and associated rights was relatively simple in United States' society and law. Even without more direct reference to the moral order, this fact contributed greatly to society's stability by giving the law a predictable basis for identifying persons who qualified for parental and spousal rights and duties.<sup>47</sup>

The legal marriage ceremony conferred the status of spouse.<sup>48</sup> Nonmarital monogamous sexual relationships, perhaps, provided a basis for social identity, but were not legally cognizable as alternatives to marriage.<sup>49</sup>

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42. *Roe v. Wade*, 410 U.S. 113 (1973); *Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106A S.Ct. 2169 (1986).

43. See the quality-of-life formula, which was at issue in *Johnson v. Sullivan*, No. Civ. -85-2434A Western Dist. of Oklahoma (Filed Oct. 3, 1985), cited by Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent* 2 J. CONTEMP. HEALTH L. & POL'Y. 126 (1986).

44. *Infants Without Brains: Should Parents of an Anencephalic Baby Have the Right to Donate the Infant's Organs*, Wash. Post, Health Mag., Jan. 26, 1988, at 16.

45. "It has also been charged that some abortionists are performing procedures that increase the risk to women in order to obtain live fetuses for research purposes." *The Selling of Body Parts*, THE NAT. L. J. Dec. 7, 1985, at 33, col. 1.

46. With respect to economic markets, familial status is protected by nonenforcement of contract. E. ALLAN FARNSWORTH, *CONTRACTS* 331, 341-47 (1982). With respect to governmental limitation, familial status is protected by implicit constitutional guarantee. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

47. Note, *supra* note 14, at 187.

48. *Maynard v. Hill*, 125 U.S. 90 (1888).

49. Even at its furthest reach, the recognition of "nonmarital relationships," as a forum within which joint property and restitutionary rights may arise, has not failed to distinguish such relationships from the institution of marriage upon which "the structure of society itself largely depends" and which the court does not intend to derogate, *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P. 2d 106 (1977). It is interesting to further note that no

Among its two paradigmatic meanings, "spouse" meant "parents of a child", or persons who had joined with the prospect of becoming "parents of a child".<sup>50</sup> Maternal status was established by birth, and although paternal status was complicated by problems of proof because no publicly ascertainable event such as birth exists to prove the father's genetic link to his child, the usual definition of legal paternity was also simple: genetic fatherhood.<sup>51</sup> There were simple rules for the identification of each of a child's parents.

Rearing relationships, and the rights and duties accompanying them, were assumed to flow from genetic lineage.<sup>52</sup> Where paternity was uncertain or marriages broke down, rearing tended to be associated with the mother, who was the one certainly identifiable parent.<sup>53</sup> Adoption was the exception, but this practice was based on the extraordinary waiver or *parens patriae* termination of the genetic parent's rights and duties.<sup>54</sup> As they become prevalent, the new reproductive technologies cause the disintegration of this stable matrix of rules for identifying parent, child, and spouse. Most of these procedures involve the donation of gametes by at least one party who is not a spouse, and to that extent they are "extramarital".<sup>55</sup> The spouses are not together the genetic parents of the child, and the parents of the child are not legally or socially spouses. As a result, such procedures undermine the paradigmatic social and legal definition of spouse. This loss of meaning is compounded when the civil law positively enforces an extramarital procreative arrangement in contravention of existing marriages, as occurred at the trial level, in the Mary Beth Whitehead case.<sup>56</sup>

The new reproductive technologies likewise cause a breakdown of the stable definition of "parent." These technologies separate genetic, gestational,

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award ultimately was made in the *Marvin* case. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 877, 176 Cal. Rptr. 555, 559 (1981).

50. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

51. Note, *supra* note 48, at 187; H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 105 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972). Marriage creates a presumption of legitimacy which may lead to the identification of a man other than the genetic father as the legal father. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975).

52. This has been called the "presumption of biology." Note, *supra* note 48, at 190, but it is better described as the meaning of lineage, S. ELIAS & G. ANNAS, *supra* note 7, at 224.

53. Note, *supra* note 14, at 187 n.2.

54. 380 U.S. 545 (1965).

55. Extramarital procedures include AID, Ovum Donation, Surrogate Motherhood, the standard case of Surrogate Embryo Transfer. The donation of "gestational services" alone is not extramarital in the same sense. It does, however, undermine the parent-child bond, by yielding a primary and exclusive nurturing relationship to another adult during the most crucial developmental phase of the child's life.

56. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super.Ct.Ch.Div. 1987).

and rearing roles.<sup>57</sup> The rearing role may be connected with either the genetic or the gestational role, or it may be set up in opposition to both.<sup>58</sup> No one role, nor any combination of them, can provide a sure basis for identifying the parent of a child or attaching rights and duties to that status.<sup>59</sup> By causing the breakdown of the paradigmatic meanings of spouse and parent, the new reproductive technologies undermine the traditional basis for the assignment of core legal rights and duties.

This breakdown in the meaning of core societal relationships has been matched by the corresponding emergence, under the new reproductive regime, of an alternative basis for assigning rights and duties. This basis rests in *individual autonomy*, which is said to have the power to structure shifting procreative and rearing forms through the law of contract.<sup>60</sup> The use of contract in this context requires the reification of one or both of the reproductive partners and of the child conceived.<sup>61</sup> It has been proposed, for example, that the embryo have the status of property subject to sale by contract.<sup>62</sup> It has also been proposed that the surrogate mother be subject to coercion specifically enforcing the use of her body by third parties.<sup>63</sup>

In this impersonal and changing framework, third-party brokerage and technical institutions have begun to emerge to provide the stable forum, previously offered exclusively by the family, and still necessary for the initiation and completion of reproductive arrangements.<sup>64</sup> The rights of these third-parties are also assigned by contract. Their rights are, thus, potentially equal or superior to those of the genetic and gestational parents. As a consequence of the emergence of contract and third-party mediating institutions, society faces the possible far-reaching commercialization of fundamental procreative and rearing relationships.<sup>65</sup>

When larger trends are consulted, the consequences of the new technologies for rights, status, and relationship within families converge somewhat with trends apparent in rising rates of nonmarital cohabitation, illegitimacy,

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57. S. ELIAS & G. ANNAS, *supra* note 5, at 223 citing Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

58. Robertson, *supra* note 6, at 1002.

59. S. ELIAS & G. ANNAS, *supra* note 5, at 238.

60. Robertson, *supra* note 6, at 960.

61. *Id.* at 1026.

62. Andrews, *supra* note 41, at 33.

63. See recommendation of ONTARIO LAW REFORM COMMISSION: REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS (1985) cited in S. ELIAS & G. ANNAS, *supra*, note 5, at 237.

64. Krause, *supra* note 17, at 199-200.

65. See generally Robertson, *supra* note 6, at 1001-23 (describing possible patterns of "collaborative" reproduction structured by contract).

divorce, and parental and spousal abandonment.<sup>66</sup>

*The Catholic Moral Evaluation of the New Reproductive Technologies and Their Societal Consequences*

The Catholic Church has applied traditional principles to reach a definite moral evaluation of the new reproductive technologies. The recent Instruction of the Sacred Congregation for the Doctrine of the Faith employs three such principles. They are as follows: 1) the moral dignity of the human person as inviolable from conception until death;<sup>67</sup> 2) human procreation as morally exclusive to marriage;<sup>68</sup> and 3) the moral inseparability of the unitive and procreative aspects of the conjugal act.<sup>69</sup> I will summarize the concrete norms, which the Instruction, I believe correctly, assumes to flow from these three stated principles. My goal is not to explain how these conclusions flow from their premises.<sup>70</sup> In the context, it is simply to state the concrete Catholic moral position, as a necessary benchmark for my treatment of law and policy.

*1. The Moral Dignity of the Human Person is Inviolable From the Moment of Conception*

The Church teaches that the personal dignity and rights of the human being begin at conception, and that they continue, at least while juridical innocence remains, until the moment of death.<sup>71</sup> Since the recognition of personhood in another is nothing other than the acknowledgment of a necessary moral obligation of equal regard to others like ourselves, personhood is not contingent on the concession by any temporal institution or even on the conscious claims of the other. The Church teaches that there is no factual basis for morally justifying the denial of such recognition from *the moment of conception*.<sup>72</sup>

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66. *Id.* at 1001, n.207.

67. VATICAN INSTRUCTION, *supra* note 1, at 9.

68. *Id.* at 14-15.

69. *Id.* at 16.

70. The Catholic understanding of moral reasoning presupposes both the authority of Scripture and the ecclesiastical Magisterium and the search for reasoned justifications. The concrete moral norms considered here are ones taught by the Magisterium. Their reasoned justification is, in the Catholic view, both possible and necessary, but it is a task far exceeding the scope of the present article. For one contemporary approach, see J. FINNIS, *FUNDAMENTALS OF ETHICS* (1983).

71. VATICAN INSTRUCTION, *supra* note 1, at 9.

72. *Id.* at 10-11; SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION, 66 ACTA APOSTOLICAE SEDIS 730, §§ 12-13 at 738 (1974). The Church's public policy position does not commit itself to a particular philosophical assertion about the moment of ensoulment or the character of the transition to personhood,

On this ground, actions inflicting, or undertaken in contemplation of inflicting direct physical harm to the embryo are excluded as immoral. According to the Vatican *Instruction*, such moral wrongs include: procured abortion of an embryo; the culling and wasting of embryos; subjection of the embryo to prenatal diagnosis, with a conditional intention of aborting; subjection of the embryo to disproportionate risk, in medical treatment; or subjection of the embryo to nontherapeutic experimentation.<sup>73</sup>

On the same ground, nonphysical assaults on the embryo's integrity and dignity are also morally excluded. In the present context, such wrongs are said by the Church to include: eugenic selection; nontherapeutic manipulation of the embryo's genetic endowment; asexual conception; conception with a nongestational purpose; freezing even for therapeutic purposes; artificial or animal gestation; and failure to show respect for embryonic remains.<sup>74</sup> In addition, respect is owed to the process which generates the human person, even when a person may not be present. On this ground, the conception of animal-human hybrids is excluded.<sup>75</sup>

In sum, personal respect for the embryo from conception provides a deontological basis for a negative moral evaluation of the actions which deliberately cause the unprecedented risks to the embryo, described above as a societal consequence of the new technologies.<sup>76</sup>

## 2. *Human Procreation Ought to Occur Exclusively Within Marriage*

A second moral principle, which the Church has applied in evaluating the new reproductive technologies, holds that unity and stability of marriage provides the only morally acceptable forum for procreation.<sup>77</sup> The exclusiveness of this requirement follows from the human dignity of the child.<sup>78</sup> Since extramarital and nonmarital procreative arrangements violate this principle, all the new reproductive technologies I have described, with the exceptions of AIH and the simple case of intramarital IVF, are, according to

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but teaches as a moral matter that withholding equal regard from one who *may* in fact be present as a person is unjustifiable. See Johnstone, *The Moral Status of the Embryo* in TEST TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES AND FUTURE POSSIBILITIES 49-56 (W. Walters & P. Singer eds. 1984).

73. WARNOCK COMMITTEE, *supra* note 7, at 11-14.

74. *Id.*

75. *Id.* at 13. One- to two-celled human-hamster hybrids are routinely created for the purpose of testing the penetrability of human sperm. *Id.* at 70.

76. The Church's position does not entail a summing of negative consequences. It starts with the principle of the moral dignity of the human person and excludes actions which violate this principle. The violation of the principle illuminates what is morally offensive about the harms described as consequences above.

77. WARNOCK COMMITTEE, *supra* note 7, at 14.

78. *Id.* at 15.

the Vatican *Instruction*, morally excluded.<sup>79</sup> Such arrangements rely on gamete donations by third-parties, even when they contemplate custody by a particular marital couple. The Church's negative moral judgment obtains, therefore even when the physical and moral integrity of the embryo is otherwise respected.<sup>80</sup>

This Catholic moral principle permits a negative deontologically based moral judgment on those deliberate actions, associated with the new reproductive technologies, which bring about the breakdown and redefinition of familial rights, status, and relationship, described above.<sup>81</sup>

### 3. *The Connection Between the Unitive and Procreative Aspects Of the Conjugal Act Is Morally Inviolable*

As Paul VI's prophetic encyclical *Humanae Vitae* taught and the Catholic tradition holds, the natural connection between the unitive and procreative aspects of the conjugal act is morally inseparable.<sup>82</sup> The Church considers all *noncoital* reproductive technologies contradict this principle, because they substitute technical intervention for the conjugal act.<sup>83</sup> Thus, this final principle excludes even AIH and IVF as acceptable moral options.<sup>84</sup> In breaking the unity between the marital act and procreation, noncoital means of reproduction are said to assert dominion over the origin and destiny of the child conceived, in a way that does not fully respect the child's dignity or the dignity of the marital relationship as the loving service of God's creative will.<sup>85</sup>

The *Instruction* notes that these methods do not share in the degree of ethical negativity found in extramarital techniques of noncoital reproduction, but, for the reasons stated, still excludes them.<sup>86</sup> In the Catholic view, lack of respect for this principle is associated with the negative societal consequences of the new reproductive technologies, in a way which is less direct, but, perhaps, more fundamental than are the other two principles mentioned.<sup>87</sup>

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79. *Id.* at 14-18.

80. *Id.* at 17.

81. *See supra* note 76.

82. PAUL VI, *HUMANAE VITAE*, 60 ACTA APOSTOLICAE SEDIS 481, §§ 12 at 488-89 (1968).

83. VATICAN INSTRUCTION, *supra* note 1, at 16-18.

84. *Id.*

85. *Id.* at 17.

86. *Id.* at 18.

87. The harms associated with the new reproductive technologies can be defined as a breakdown in the respect for the marriage bond and for the life and integrity of the embryo. By definition, these harms represent violations of the other two principles discussed. They do not, by definition, however, make direct reference to this third principle, although, at a more

The Church has expressed compassion for those on whom the existential weight of these concrete moral norms falls. The Church wishes to console and reassure those childless couples who subjectively experience the Church's norms as an added wound beyond childlessness itself—a perceived condemnation of the profoundly human desire for a child.<sup>88</sup> It also addresses its concern to the researcher, who fears that compliance with the norms advanced by the Church will too quickly foreclose essential knowledge in biology and genetics.<sup>89</sup> The Church's compassion, however, is grounded in an unqualified commitment to human dignity making its norms in this area exceptionless.<sup>90</sup>

## II. CATHOLIC PRINCIPLES FOR JUSTIFYING AND PRESCRIBING THE SCOPE OF CIVIL LAW INTERVENTION

The new reproductive technologies call for acts not morally justifiable, but are these morally unjustified acts among those that the *civil law* ought to restrain? What the moral order excludes and what the civil order ought to prohibit are, as is well recognized in the Roman Catholic tradition, two separate questions.<sup>91</sup> Granting that the moral order grounds the legitimacy of law, neither abstract moral principles nor concrete moral norms alone are enough to specify the law's content. In order to justify and prescribe the content of law, abstract moral principles governing human action generally, such as those just discussed, must be mediated by the jurisprudential principles that govern the question of common action undertaken to order the good of the whole community.<sup>92</sup>

Public opinion is virtually unanimous in holding that the new reproductive technologies require a decisive legal response, but judgments differ about the precise nature of the ends and means which ought to be pursued. Some hold the position that the new technologies are good or at least not the kind of harm that the law should seek to restrain.<sup>93</sup> These voices may hold that

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fundamental level, it is arguable that the choice to disrespect the inseparability of the procreative and unitive meaning in the sexual act opens the door to a lack of appreciation for the moral meaning of both the marriage bond and the life of the embryo.

88. VATICAN INSTRUCTION, *supra* note 1, at 19.

89. *Id.* at 7-8.

90. The Church's insight into the value of the human person is grounded in its faith in the human person's transcendent source and destiny. In addition to existing philosophical grounds, the Church's confidence in its ability to teach exceptionless moral norms with authority is based in its faith in divine revelation. *Id.* at 9.

91. J.C. MURRAY, WE HOLD THESE TRUTHS 155-74 (1960).

92. T. AQUINAS, SUMMA THEOLOGICA, I.II. Q. 95; VATICAN INSTRUCTION, *supra* note 1, at 20.

93. See, e.g., L. ANDREWS, NEW CONCEPTIONS: THE CONSUMER'S GUIDE TO THE

the law should do no more than regulate the technologies for efficiency, predictability, and the health of the adult participants.<sup>94</sup>

Most agree that the new technologies entail harm.<sup>95</sup> The Church perceives that such harm has the character of a profound injury to human dignity. On what theoretical basis can such harm be said to be of the kind which the law ought to prevent, and what preventative means ought the law to employ in countering it? These jurisprudential questions must be answered, before specific policy recommendations can be reached.

### *Applicable Catholic Doctrine*

The Catholic tradition embraces a specific body of doctrine which assists in answering these questions. The Congregation's *Instruction* makes a succinct reference to Catholic jurisprudential doctrine, when, in its final section, it cites paragraph 7 of *Dignitatis Humanae*.<sup>96</sup> This conciliar pronouncement on the role of the civil law is the corner stone of contemporary Catholic approaches to law.<sup>97</sup> Pope John XXIII's Encyclical *Pacem in Terris*<sup>98</sup> and the Second Vatican Council's Pastoral Constitution *Gaudium et Spes*<sup>99</sup> are of particular assistance for defining the broader underpinnings of the mind of the Church, as it is expressed in *Dignitatis Humanae* 7. The teaching of these documents provides a foundation for both generic and specific legal recommendations concerning the new reproductive technologies. The following account is intended as a synthesis of the position found in these magisterial documents.

In the Catholic view, the civil law's moral justification is ultimately grounded in the nature of the human person, as a social being who must pursue the good in community with others.<sup>100</sup> Life in community requires an ordering, which in at least one fundamental respect can only be guaran-

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NEWEST INFERTILITY TREATMENTS INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION AND SURROGATE MOTHERHOOD (1984).

94. In this view, negative restrictions should be limited to the purposes of efficiency, predictability and the health of the adult participants. It should not be overlooked, however that this view tends to hold that the law should be modified to provide for the positive enforcement of nonmarital procreative contract arrangements against the objections of genetic parents and birth mother. Robertson, *supra* note 6, at 960-62.

95. Krause, *supra* note 17, at 185-88. As Krause points out, the challenge is rationally to identify true harms and distinguish them from understandable but nonrational fears.

96. VATICAN INSTRUCTION, *supra* note 1, at 20 n.60.

97. J.C. MURRAY, *Introduction to DECLARATION ON RELIGIOUS FREEDOM (Dignitatis Humanae)* in THE DOCUMENTS OF VATICAN II 672-74 [hereinafter DECLARATION ON RELIGIOUS FREEDOM] (W. Abbott & J. Gallagher eds. 1966).

98. JOHN XXIII, *supra* note 4, at 124-70 (1977).

99. PASTORAL CONSTITUTION, *supra* note 3, at 199.

100. *Id.* at 284.



teed by civil law.<sup>101</sup> This fact gives the law its legitimacy. The law retains its legitimacy, as long as its end remains the ordering of society to the common good.<sup>102</sup>

The Church understands the common good, which is the justifying moral ground and guide of the civil law, to be "the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a thorough and ready way."<sup>103</sup> The fulfillment which the Church here envisions is the "integral perfection" of the human person in relation to a "hierarchy of values".<sup>104</sup> These values include, and thus, the law must promote, the bodily needs of the community, including the material means for meaningful human life and action<sup>105</sup> and the absence of civil strife.<sup>106</sup> But, they also include moral needs:

The order which prevails in society is by nature moral. Grounded as it is in truth, it must function according to the norms of justice, it should be inspired and perfected by mutual love, and finally it should be brought to an ever more refined and human balance in freedom.<sup>107</sup>

The law can be morally justified, only if it also orders the community in relation to these transcendental values.<sup>108</sup> In the Catholic view, it is in relation to such values that the human person can thrive and reach his or her "integral perfection."

### *The Role of Justice*

Truth, charity and freedom help ground the civil law's legitimacy, but *justice* is the value serving as primary norm for evaluating the legitimacy of a law or legal system. As *Pacem in Terris* states, justice is the norm which governs the "function" of law.<sup>109</sup> The paramount obligation of the law is to provide justice for its citizens.<sup>110</sup> It meets this obligation by defending the rights and adjudicating justly between the claims of citizens.<sup>111</sup> In doing so, it must be evenhanded, providing its protection equally to all.<sup>112</sup> Where the

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101. DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 7 at 685-87.

102. PASTORAL CONSTITUTION *supra* note 3, § 74 at 284.

103. *Id.*

104. JOHN XXIII, *supra* note 4, §§ 57-58 at 138.

105. *Id.* § 64 at 139-40.

106. DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 7 at 685-87.

107. JOHN XXIII, *supra* note 4, § 37 at 133.

108. *Id.* § 38 at 133.

109. *Id.* § 37 at 133.

110. *Id.* § 60 at 139.

111. *Id.* § 62 at 139. DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 7 at 685-87.

112. JOHN XXIII, *supra* note 4, § 65 at 140.

law loses its commitment to doing justice for persons or to administering justice with an even hand, it suffers a fatal wound to its own legitimacy. As the recent *Instruction* states: "The very foundations of a State based on law are undermined."<sup>113</sup>

### *The Basis of Rights*

It should be apparent that the civil law can do justice, only if it has a basis for assigning rights. What are rights? Some may be contingent on political agreement, but the Church recognizes that others have a deeper basis. Some, for example, are a function of a basic right to participate meaningfully in the life of the political community.<sup>114</sup> Others belong to a person merely by virtue of his natural dignity as an individual person. This latter kind of right includes the right to life and respect for one's physical integrity.<sup>115</sup>

Yet other rights belong to a person by reason of his or her status within a family. Rights and duties flowing from familial status are not derived from any political choice, but rather are fundamental to the nature of the human person.<sup>116</sup> The state has a role in coordinating family relationships and in promoting them, but it does not create them.<sup>117</sup> In sum, the rights that it is the law's most fundamental duty to promote and to defend derive from a status and have a core content, which the state has no authority to alter. As we consider them here, they flow from the nature of the person, as individual and as related to others in a family.<sup>118</sup>

On this basis, those *moral* rights to personal life and integrity and to membership in an integral family, which account for the moral critique of the new reproductive technologies discussed above, can be said to have, as well, an unalterable bearing on the content of *legal* rights. The scope of legal rights must be justified and prescribed in relation to these same moral rights.<sup>119</sup>

Although legal rights must be morally grounded, their recognition may extend only as far as the law's particular function warrants. The scope of moral rights, by contrast, is coextensive with human interaction. Many moral injustices are, therefore, beyond the competency of the law to prevent

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113. VATICAN INSTRUCTION, *supra* note 1, at 20.

114. PASTORAL CONSTITUTION *supra* note 3, § 75 at 285-87.

115. JOHN XXIII, *supra* note 4, §§ 9,11 at 126.

116. DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 5 at 683; PASTORAL CONSTITUTION *supra* note 3, § 25 at 224.

117. JOHN XXIII, *supra* note 4, § 62 at 139.

118. *Id.* § 9 at 126.

119. It is on this basis, rather than on the simple basis of moral objection that the Church calls for legal restrictions on aspects of the new reproductive technologies. VATICAN INSTRUCTION, *supra* note 1, at 20-21.

or correct. One *limit* on the function of the civil law in pursuit of justice arises from the law's secondary moral orientation to other aspects of the common good: truth, charity, and freedom.<sup>120</sup> The value of *freedom*, in particular, requires that the law pursue justice according to the mean and no further<sup>121</sup>.

According to *Dignitatis Humanae* 7, the mean of justice in relation to freedom is established by the requirements of the *public order*.<sup>122</sup> In defining particular legal rights and in deciding how far to go in enforcing them, the lawmaker must always ask whether a moral right or its application, when based in justice, is of a character to matter to the public order.

An aspect of justice which inextricably concerns the public order concerns the recognition of *status*, a question of not "what", but "who". *Who* shall have the status to demand rights and to be charged with duties? Where justice, in the moral sense, recognizes a *status* as morally constitutive of the social order, it is, by definition, a matter of what *Dignitatis Humanae* calls the public order and must be recognized as giving rise to *legal* rights.<sup>123</sup>

When one says that the law must recognize the moral status of personhood and of relations within the family, one is claiming that these realities are constitutive of the social order. As the Vatican Instruction puts it, they are "constitutive elements of civil society."<sup>124</sup> Their basis in morality must, always and everywhere, translate into recognition under law. In the Catholic view, no deference even to freedom or truth or charity is, in principle, capable of requiring that such recognition ever be denied.<sup>125</sup>

The scope of substantive rights accompanying the recognition of status is admittedly a separate question. On this level, the law must moderate the extent of its reach, in keeping with its commitment to fundamental values other than justice, such as freedom. Still, even on this level certain minimums must be satisfied. With respect to rights flowing from the status of person, the right to life and respect for one's bodily integrity is within the minimum recognition necessary, as United States law agrees. Our tort and criminal law would never, for example, permit the harms to jeopardize the

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120. JOHN XXIII, *supra* note 4, § 37 at 133.

121. DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 7 at 685-87.

122. *Id.* § 8 at 687.

123. *Id.*

124. VATICAN INSTRUCTION, *supra* note 1, at 20.

125. "Society has the right to defend itself against possible abuses committed on pretext of freedom . . . . It is the special duty of government to provide this protection . . . . Its action is to be controlled by juridical norms which are in conformity with the objective moral order. These norms arise out of the need for effective safeguard of the rights of all citizens." DECLARATION ON RELIGIOUS FREEDOM, *supra* note 97, § 7 at 686-87.

adult, which currently threaten the extracorporeal embryo.<sup>126</sup> The argument in connection with the embryo concerns, then, not the reach of the right to life and physical integrity, but entitlement to the status of personhood. As the *Instruction* teaches, the embryo is morally a person, since there is no basis in fact which would justify our withholding from it equal regard as another like ourselves.<sup>127</sup> It follows that the embryo must have personal status *under the law*. Any distinction made among living embryos based on genetic qualities, sex, or stage of development constitute invidious discrimination contradicting the law's legitimating orientation to the moral value of justice. As a person, the embryo deserves the same substantive protection received by others.

Because the Church teaches that status flowing from relations within the family also is constitutive of the social order, this element of status, too, is a matter of the public order, and must be recognized as a nondefeasible basis for assigning legal rights and duties. The status of "Parent," "Child of Parent," and "Spouse" are all moral bases beyond the status of simple personhood, which the law is obligated to recognize in assigning rights. In addition, the complex of status relationships known as marriage and the family is morally entitled to legal recognition as having a group status relevant to the coordination of rights and duties flowing from the subsidiary aspects of generational relationships.<sup>128</sup>

### *Substantive Legal Protection of the Familial Rights Affirmed in Catholic Doctrine*

The civil law has, until now, recognized the normative status of marriage and the family, as an integral unit. It has done so primarily through grant-

126. The torts of battery and negligent injury or wrongful death come to mind, as do the crimes of assault, manslaughter, and murder.

127. The *Instruction*, like the DECLARATION ON PROCURED ABORTION, *supra* note 72, says that the *juridical* recognition of personhood is morally required from the moment of conception, even though personhood in the sense of ensoulment might not yet be present. The *possible* presence of a person means that restraint by others is morally required, without proof that a person in the transcendent sense is present. In other words, with conception, the burden of proof shifts to those who wish to assert that no person is present. If conception is defined as a process, the moral obligation of respect commences when the process *begins*.

128. The United Nations' Declaration of Human Rights provides in Article 16 that "[t]he family is the natural and fundamental group unit in society and is entitled to protection by society and the State." UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948. The VATICAN INSTRUCTION, *supra* note 1, at 20, speaks of the "rights of the family." In our legal system "rights" are generally recognized when asserted by "legal persons" which means individuals and corporate organizations constructively treated as persons under the law. How is the law to recognize the "rights" of an entity that is not an individual and is not a constructive legal person? It would probably be through recognition of rights in *individuals* who share in the corporate status of family member.

ing monogamous marriage an exclusive role as the choice-based norm which coordinates the status rights of spouses, parents, and children.<sup>129</sup> This grant is given effect, largely, by denying recognition to contracts which attempt to compete with this coordinating function. The law has, until now, deemed such contracts unenforceable and void as against public policy.<sup>130</sup> In addition, the civil law has traditionally taken positive steps to foster the strength and effectiveness of families in providing for the welfare of their members, while denying such assistance to alternative domestic arrangements which compete with the family for social resources.<sup>131</sup> Reinforcement of the family through the use of direct penalties leveled against alternative forms of engendering and rearing children is inadmissible, because the hardships of the penalty would tend to flow through to the children.<sup>132</sup>

For confirmation that elements of familial status are a matter of the public order, consider once again the societal disorder which the new reproductive technologies cause for the identification of the adult who has the right and duty to raise a particular child. The state cannot, in a given case, even identify with certainty which adult has the duty to raise a particular child. No one suggests that this disorder is tolerable. The question is only how order or the semblance of order will be re-established. Some authorities are willing to rely on concepts of contract obligation as an alternative basis for establishing predictability and order in this area. In Canada, the Report of the Ontario Law Reform Commission made such a recommendation concerning surrogate motherhood. It suggested that the civil law ought to enforce and supervise the formation of surrogacy contracts.<sup>133</sup>

However, the right to recognition under law, as "parent," "child of parent" and even, to a diminished extent, "spouse" should not be considered contingent on the existence of an integral marriage or family structure. When the institution of the integral family dissolves or never completes its formation, as today unfortunately too often is the case, each of these elements of moral status survives in its own way. The state simply has the

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129. *Reynolds v. United States*, 98 U.S. 145 (1878). One instance of the coordinating effect of marriage is the presumption of legitimacy of children which it creates. *Beck v. Beck*, 304 N.E.2d 541 (Ind. App. 1973).

130. FARNSWORTH, *supra* note 46, at 341-47.

131. Traditionally, the law protected the welfare of legitimate children at the expense of illegitimate children. This approach has been struck down by the United States Supreme Court in a series of cases beginning in the late 1960s, as a violation of equal protection. *Levy v. Louisiana*, 391 U.S. 68 (1968). Tax advantages were removed by the Revenue Act of 1969. Bittker, *Federal Income Taxation and the Family*, 27 STAN.L. REV. 1389 (1975).

132. Even indirect approaches have been struck down by the United States Supreme Court as a violation of equal protection. *See e.g. Levy v. Louisiana*, 391 U.S. 68.

133. MINISTRY OF THE ATTORNEY GENERAL (CANADA), ONTARIO LAW REFORM COMMISSION: REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS (1985).

added burden of coordinating their exercise under conditions of relative disorder. The illegitimate child, for example, clearly has a moral status, and should have the legal status as well, for demanding support from its parents.<sup>134</sup>

The approach of the Ontario Law Reform Commission, which purports to restore order to the procreative area by providing for the legal enforcement of judicially supervised surrogacy contracts, represents a quite serious breach of this principle. Although an understandable response to disorder, it amounts to the legal suppression of inalienable moral status, and thus, to an even greater disorder on the moral level. Its recommendation would ensure not the rule of law, but, in fact, implicit systematic violence.

The genetic parent and child relationship gives rise to natural rights and duties which the law must coordinate, but which the law did not create and may not suppress. Similarly, the covenant between a rearing parent and a child, even in cases in which the parties are not genetically related, such as adoption, gives rise to moral rights and duties, which the law must coordinate, but not suppress.<sup>135</sup> The central illustration of such a rearing bond and covenant is *the bond between mother and child during gestation*. This tie has moral meaning beyond the mother's simple genetic relationship with the child. If forced to choose among the elements of parenthood, disintegrated by the new reproductive technologies, I would say that this is society's most primal and inalienable bond. Whether or not genetically related to her child, the gestational mother has parental rights which merit legal protection.<sup>136</sup>

Since time immemorial, the rights of genetic parents in the rearing of a child have, on occasion, come into conflict.<sup>137</sup> However, such conflicts are not resolvable by contract, because the rights involved are not created by the intentions of the parties, but flow rather from the nature of the human person. Custody disputes, therefore, ordinarily are resolved in keeping with equitable principles to which the law appeals in coordinating conflicting rights when the natural coordinating function of the family breaks down.<sup>138</sup> In our

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134. The UNITED NATIONS DECLARATION OF HUMAN RIGHTS, for example, specifies that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of . . . birth or other status." UNITED NATIONS, *supra* note 128, at Art. 2.

135. This covenant is given recognition in much contemporary state law on child custody by recognizing that the child's best interest is generally to remain with the adult with whom he or she has forged a primary covenantal bond. An influential work in this development is J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979). An illustrative case is *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966).

136. For a supporting opinion, see S. ELIAS & G. ANNAS, *supra* note 5, at 238-39.

137. Rules for resolving such conflicts have varied. Under Roman law, for example, the *patria potestas* resolved conflicts in favor of the father. THE INSTITUTES OF JUSTINIAN xxxviii-xxxix (Sandars trans. 1941).

138. See *In re Baby M*, 217 N.J.Super. 313, 525 A.2d 1128.

time, events have led to the new possibility of conflict between the rights of a gestational mother and the rights of a genetic father, or even a separate genetic mother. Where society cannot prevent such conflicts from arising, justice requires that they be resolved according to equitable principles which coordinate the rights of all, in keeping with the best interests of the child.<sup>139</sup>

As between the genetic parent and the gestational mother, the gestational mother's rights ought generally to be given a certain preference. The grounds for this preference include, but are not limited to, the moral priority of *covenant* over *lineage* and the importance to society of the gestational bond. Based on similar reasoning, Australia's Waller Commission recommended that the gestational mother enjoy, in every case, the irrebuttable presumption of legal maternity.<sup>140</sup>

The law ought to foster the health of the integral family. But, when the integral family breaks down, the law ought to continue to give full recognition to the subsidiary elements of natural moral status found in "parent," "child of parent" and, to the extent relevant, "spouse." The welfare of children must be sought within this residual moral framework. The law may not, without losing its moral legitimacy, introduce alternative forms of organization such as those grounded in contractual intention which serve to suppress these moral elements.

### III. GENERIC RECOMMENDATIONS FOR A CIVIL LAW RESPONSE TO THE NEW REPRODUCTIVE TECHNOLOGIES

Based on the principles and facts discussed thus far, several generic recommendations can be advanced to guide the response of lawmakers to the new reproductive technologies. My recommendations touch on the following interrelated questions: (1) the status of the embryo; (2) the rights and welfare of the embryo; (3) the status of marriage; (4) the status of the genetic bond; (5) the rights and welfare of natural parents and children; (6) the status of gestational mother; and (7) the rights of the gestational mother.

1. STATUS OF THE EMBRYO: *The legal personhood of the embryo ought to be recognized from the moment of conception.* In assigning personal status, any distinctions between embryos based on individual characteristics, such as sex, stage of development, or genetic traits are invidious discriminations, tend to undercut the moral underpinnings of the legal system as a whole. The recommendation, made by the Warnock Committee of

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139. The best interest of the child is the factor generally used to break ties when parental rights are in conflict. For the application of this principle in the context of the new reproductive technologies, see Krause, *supra* note 17, at 192.

140. S. ELIAS & G. ANNAS, *supra* note 5, at 236.

Great Britain and the Waller Commission of Australia, that protection should be granted embryos against nontherapeutic experimentation and destruction only upon their reaching the fourteenth day from conception, is not acceptable.<sup>141</sup> The fourteen-day line of demarcation which they draw, based on evidence of "individuation," cannot support the juridical weight placed upon it.<sup>142</sup>

The advent of extracorporeal embryos in this context shifts the locus of the discussion of embryotic status away from abortion. It should not be overlooked that this shift presents an opportunity for improving the level of the public debate. There are two grounds for this: (1) the shift separates the question of personhood from the separate question of resolving a particular conflict between a woman's perceived interests and those of the child;<sup>143</sup> and (2) it definitively defeats the idea that the event of birth is an adequate definition of personhood.<sup>144</sup>

At present, in the United States, there is *no* accepted basis for defining the grounds for recognition of legal personhood. The danger, as an ever more alarming train of events begins to show,<sup>145</sup> is that personhood will eventually

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141. For a general discussion of the content of the Recommendations, see, Smith, *Procreational Autonomy v. State Intervention: Opportunity or Crisis for a Brave New World?*, 2 NOTRE DAME J. LAW, ETHICS & PUB. POL'Y 635, 645-46 (1986).

142. Sherman Elias and George Annas state: "Until the basis of the 14-day limit is more clearly articulated and publicly accepted, it cannot serve as a legitimate regulatory boundary. Are we concerned with what the embryo *is*, what it looks like or what it feels? Or are we concerned with what it *will be*, or what it will never have a chance to be, or with what it will look like or feel? Or is the focus of our concern something else entirely?" S. ELIAS & G. ANNAS, *supra* note 5, at 227.

143. Whether the fetus is a person is a separate question from that of whether the mother's desire to terminate gestation should override the fetus' right to life. Judith Jarvis Thomson's well-known defense of abortion analogizes the fetus to a violinist, a member of society whose personhood is hardly contested. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971).

Of course, the child, unlike a random violinist, is owed a parental duty by the mother, so that Thomson's analogy is not persuasive on the ultimate question of whose "rights" should prevail in the abortion dilemma.

144. Justice Blackmun in *Roe v. Wade* held that the developing human individual even if viable, has no rights prior to birth and if its welfare prior to that time can be protected at all, it is only based on the *state's* interest in "potential life." *Roe v. Wade*, 410 U.S. at 113. Practically speaking, the decision implies or has been taken to imply that personhood begins at birth. The new reproductive technologies, through the possible advent of "ectogenesis," open the possibility that some persons will make the transition to personhood, as had MacDuff in Shakespeare's *MacBeth* ("[O]ne not of woman born" SHAKESPEARE, *MacBeth*, in THE COMPLETE WORKS OF SHAKESPEARE 1070 (Craig & Bevington eds. 1973)), without ever having been "born." In any event, these technologies originate extracorporeal embryos whose status must be determined without any reference to the possibility of birth.

145. Among such events, I would classify the trial level opinion in *In re "Baby M,"* 217 N.J.Super. 313, 525 A.2d 1128, advocacy of commercial use of the tissues of aborted fetuses, and the preparation of live anencephalic babies for organ harvesting. The cause of the alarm



be defined as a status having no deeper basis than an elective legal conferral. There is an urgent present need to cement a consensus on the necessity of grounding legal personhood in some fundamental aspect of human nature. The Church is correct that the only truly defensible basis for recognizing legal personhood is conception.<sup>146</sup> At the same time, the Church might wish to see relative value in positions which, at least, posit that some other threshold of human development, whether individuation, brain birth, sentience, or viability, grounds legal personhood morally. In addition to challenging those who hold such positions to move towards conception as a more defensible line of demarcation, the Church should urge such proponents consistently to apply whatever threshold they advance. This would include refusing to carve out exceptions which would deny protection to the handicapped.<sup>147</sup>

Where acknowledgment of embryotic personhood is not forthcoming, secondary arguments should be made that embryos merit recognition at least as "protopersons" because of the respect due generally to the origins of human beings.<sup>148</sup> The argument that human origins should be respected even when personhood may not be considered present is useful in offsetting frequently encountered arguments that prior legal restraint on the circumstances of conception cannot be based in the rights of the child who does not yet exist, and who will not come to exist unless the circumstances are left unrestrained.<sup>149</sup>

Unfortunately, under present conditions, it is not enough to advocate personal or "protopersonal" protection for the embryo. Arguments are even more urgently necessary that the embryo ought to be denied the status of personal property. Such property treatment is a present fact, and its legal recognition is a present danger.<sup>150</sup> For this reason, the Warnock Committee

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lies in the combined foreseeable consequences for basic human values together with certain indications that there may be an absence of "brakes," in the form of insight and commitment by courts, legislatures, and the general populace. See Neuhaus, *Nihilism Without the Abyss: Law, Rights, and Transcendent Good*, 5 J. LAW & RELIG. 53, 56 (1988).

146. VATICAN INSTRUCTION, *supra* note 1, at 2.

147. A certain trend towards greater legal recognition for the rights of handicapped persons has been matched by a trend on some fronts invidiously to discriminate against handicapped persons based on quality of life and other criteria. See generally Destro, *supra* note 44.

148. Robertson, *supra* note 6, at 974-75, citing 2 J. FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 56-57 (1985) and Ozar, *The Case Against Thawing Unused Frozen Embryos*, 15 HASTINGS CENTER REP. 7, 10-12 (1985).

149. *Id.* at 992.

150. Unregulated dominion permitted over extracorporeal embryos and fetuses constitutes treatment as property. See, e.g., L. Mettler and H.W. Michelman, *Chromosome Studies of Early Human Embryos: Proof of Fertilization in Uncleaved Human Oocytes in In Vitro Fertilization and Embryo Transfer* (M. Seppala and R.G. Edwards eds. 1985) (describing experimen-

recommended that no one should be allowed to have a property interest in a human embryo.<sup>151</sup> Legally enforced treatment as property subject to purchase, sale, and dominion under contract is a decidedly less favorable status than mere nonrecognition as a person. *No one should have a property interest in an embryo, and the sale or other commercial transfer of an embryo should be prohibited.*

Whether the law recognizes the embryo as a person suffering from the "legal incapacity" of a minor child (the Catholic position)<sup>152</sup> or as a "protoperson" which is at least shielded from status as personal property,<sup>153</sup> the embryo must be protected by clear rules keeping it under the continuous<sup>154</sup> protection of a responsible guardian both *in vivo* and *in vitro*. Where the law is unable to exclude extracorporeal conceptions and where no parent is available, the scientific or medical personnel who have temporary custody over the embryo should be required to observe guardianship standards.<sup>155</sup>

2. THE RIGHTS AND WELFARE OF THE EMBRYO: The human embryo ought to be accorded legal protection against actions compromising its life or its physical and moral integrity on the ground that it is a human person. But, abstract recognition of such rights and status is *not* adequate protection for the embryo's welfare. A *legal construct* of status and rights protecting the extracorporeal embryo cannot be expected to work unless it is relied upon in only the *exceptional* case. Even if such a construct is adopted, it will be eroded and probably eventually fall, if the opportunity for mastery over one so weak and difficult to see as the extracorporeal embryo is made widespread. The uninterrupted preservation of the gestational bond is the only sufficient protection for the embryo's concrete rights and welfare. Extracorporeal conceptions should, therefore, be discouraged, if they cannot be prohibited outright.<sup>156</sup>

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tal use of one-celled and other human embryos obtained through *in vitro* fertilization). Legal recognition is being advocated by same. See Andrews, *supra* note 42, at 37.

151. WARNOCK COMMITTEE, *supra* note 7, at 56.

152. Under law, children are recognized as persons, but are seen as suffering from legal incapacity until they reach majority. They cannot bind themselves irrevocably by contract, J. MURRAY, MURRAY ON CONTRACTS 12 (1974), and, in legal process, they require representation by a guardian *ad litem* Veazey v. Veazey, 560 P.2d 382 (Alaska 1977).

153. See *supra* note 148.

154. There should not be any "window" of choice about whether to confer reified, as opposed to personal status on a developing human life.

155. The protection of a particular embryo should not depend on "parental" intention, nor should the "research" intentions of a custodian alter the protocol for how custody is to be observed.

156. The VATICAN INSTRUCTION does not specifically mention the simple case of IVF among the technologies which ought to be prohibited by law. VATICAN INSTRUCTION *supra* note 1, at 20. Some believe it probable that the United States Supreme Court would hold the

If general popular sympathy with the aspirations of infertile couples means that IVF cannot be outlawed,<sup>157</sup> every precaution should be taken to ensure that IVF remains the *exceptional* procedure. The delivery of IVF services should be limited to the context of medical treatment, available only upon a showing of infertility.<sup>158</sup> Minimal conditions for the protection of prospective children should also be required. The couple should be restricted to those in an intact marriage.<sup>159</sup> The physician should be required to meet a regulatory burden of showing that the extracorporeal safety of the embryo is ensured.<sup>160</sup> On this basis, the conception of spares, the culling of undesirables, and the storage of frozen embryos ought to be prohibited.

The public funding of IVF ought to be prohibited for at least two reasons. The practice offends the moral beliefs of many in society,<sup>161</sup> and its funding would contradict distributive justice to other societal needs, in view of the elective nature of the procedure and its very high expense.<sup>162</sup> Since the scope of IVF should be strictly limited to the treatment of infertility, eugenics and experimental research should be strictly excluded by law. Opportunism by those pursuing these ends should be vigorously excluded.

3. STATUS OF MARRIAGE: Legal recognition of the family as an integral unit requires a renewed legal commitment to the institution of marriage as the exclusive positive organizing principle based on individual choice for coordinating rights and duties in the procreative arena. *Contract obligation ought to be strictly excluded, as a basis of rights and duties, in connection with gamete donation, embryo donation, gestational "services" and child custody.*<sup>163</sup> Where family rules grounded in marriage do not operate

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simple case of IVF between married people constitutionally beyond prohibition. *Alternative Reproductive Technologies*, *supra* note 2 (statement of George J. Annas).

157. The methodology of, perhaps, the majority of recent writers on the legal response to the new reproductive technologies relies on the probable demand for the technologies by a growing infertile population as a starting point for analysis. See, e.g., Smith, *Intimations of Life: Extracorporeality and the Law*, 21 GONZ. L. REV. 395 (1985-86).

158. Other socially negative applications would include "[u]se of the technology to gain access to the embryo for research or genetic manipulation; avoidance of pregnancy for "convenience" of genetic mother; use of technique for eugenic purposes." S. ELIAS & G. ANNAS, *supra* note 5, at 225 (Table 9-1).

159. Further reasoning in support of this conclusion, can be found in Krause, *supra* note 17, at 197-98.

160. This regulation should balance enforcement by both criminal sanctions, see recommendations of the Warnock Committee, WARNOCK COMMITTEE *supra* note 7, at 66, and the Vatican *Instruction*, VATICAN INSTRUCTION, *supra* note 1, at 20, and peer and professional censure. The Warnock Committee's recommendation of a permanent licensing board, WARNOCK COMMITTEE, *supra* note 7, at 75 poses the serious danger that the government would be viewed as condoning techniques which are morally objectionable to many.

161. L. ANDREWS, *supra* note 93, at 14.

162. Smith, *supra* note 157, at 397 n.21.

163. The enforcement of a contract to supply order to societal interaction under the new

because marriage is absent, principles of equity should be used to coordinate residual rights and duties. Several court decisions have responded to surrogacy contracts in this manner; most recently, the decision of the New Jersey Supreme Court in *In re Matter Baby "M."*<sup>164</sup>

Ideally, deliberate third-party gamete donations would be prohibited as an undue form of competition with marriage and as against the rights and welfare of the parties.<sup>165</sup> However, the prevalence of AID and the impossibility of enforcing laws against it militate against prohibition. Two hundred and fifty thousand persons now living in the U.S. have been conceived by AID.<sup>166</sup> AID is easily accomplished in the home, without medical mediation, as the numerous "baster" babies born in the United States every year attest.<sup>167</sup>

4. THE STATUS OF THE GENETIC BOND: *Genetic parenthood ought to be recognized as giving rise to "prima facie" rights and duties* which may not be alienated by contract. Gamete donors should be included as the subjects of such rights and duties. Rights and duties accompanying the status of genetic parenthood should be waivable, or terminable by state *parens patriae* recognition, but only as equity permits.<sup>168</sup> Fees for gamete donation should be prohibited, as commercializing basic human relationships.<sup>169</sup>

The outright prohibition of gamete donation would be a valid legal goal, if it was enforceable. By removing fees and leaving *prima facie* parental duties intact, it is at least possible to limit the practice to cases which are least societally damaging.<sup>170</sup> Because the only rationale publicly advanced in sup-

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reproductive technologies has been proposed for these purposes. Robertson, *supra* note 6, at 1003.

164. *In re Baby M*, 14 Fam L. Rep 2007 (1988).

165. The Vatican Instruction recommends such a prohibition. VATICAN INSTRUCTION, *supra* note 1, at 20.

166. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAMILY LAW Q. 1-13 (1980).

167. Robertson, *supra* note 6, at 1004.

168. If drafted with care, waiver and termination might, by statute, automatically accompany certain acts showing abandonment or personal disregard for offspring. Such acts might include donation of gametes under legally regulated medical supervision. The recognition of the rights of the genetic parent does not require the elimination of the presumption of legitimacy accompanying marriage, but it does require renewed discussion of the meaning and limits of the presumption.

169. For a discussion of the societally negative aspects of "sperm vending," see S. ELIAS & G. ANNAS, *supra* note 5, at 227-28.

170. The least societally damaging instances would be ones where the personal nature of the contribution by the gamete donor is recognized. Such a recognition would tend to follow from acknowledgement that the contribution cannot be bought, but must be truly donated, and that it is a contribution to the prospective child (lineage) rather than to the facilitator or the rearing parents.

port of gamete donation is infertility, the application of AID and ovum donation for eugenic purposes and sex selection should be prohibited by law. Government funding ought to be denied because the practice is morally unacceptable to many. Regulation for the health of the participants should be carefully designed to avoid the appearance of state approval.<sup>171</sup>

5. THE RIGHTS OF NATURAL PARENTS AND CHILDREN: The rights of genetic parents in their children include a *prima facie* right to rear the child. This rearing right should not be waivable or terminable except by state procedures which are duly informed by equitable regard for the parent and by concern for the best interests of the child. Such rights should also be subject, where appropriate, to coordination in accordance with the preemptive status of the marital relationship.<sup>172</sup>

*Genetic children should have a nonwaivable right to knowledge about their genetic lineage.* In cases of third-party procreative arrangements, this means that the child should have controlled access to records showing the genetic background and even the identity of the donor. The scope of anonymity should be defined primarily by reference to the best interests of the child.<sup>173</sup> Deliberate action within a third-party procreative arrangement to disguise the lineage of the child should be criminalized.<sup>174</sup>

6. THE STATUS OF THE GESTATIONAL MOTHER: *The gestational mother's covenantal relationship with her child should give her legal status as mother, whether or not she is genetically related to the child.* Ideally, however, gestation by a mother not the genetic mother should be prohibited by law because the conflict this practice causes places more weight on the legal construct of rights and duties in this area than it can reasonably be expected to bear.<sup>175</sup> Any donation of gestational "services" by the genetic mother ought also to be prohibited *as far as is practicable* because it causes a

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171. The transmission of venereal disease to the woman accepting AID is a significant possibility. Negative consequences are heightened in view of the AIDS epidemic. *Artificial Insemination and AIDS*, *supra* note 18, at 16. (Four Australian women infected with AIDS virus through AID). Present screening procedures are generally inadequate and should be improved. Mascola & Guinan, *Screening to Reduce Transmission of Sexually Transmitted Diseases in Semen Used for Artificial Insemination*, 314 NEW ENG. J. MED. 1354 (1986). On the danger of the popular interpretation of government regulation as societal approval, see S. ELIAS & G. ANNAS, *supra* note 5, at 230 (regarding surrogate motherhood).

172. For example, through the presumption of legitimacy which accompanies marriage. *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975).

173. Annas, *supra* note 166, at 11.

174. An unmarried woman who is an ordained Episcopal priest reported in the Washington Post that, in arranging the artificial insemination of a daughter, she mixed sperm samples from three men, to disguise the paternity of the child so that the girl's genetic father could never attempt to relate to the child. *A need examined, a prayer fulfilled; unmarried priest bears child by artificial insemination*, Wash. Post, Dec. 7, 1987, at A1, col. 1.

175. S. ELIAS & G. ANNAS, *supra* note 5, at 227.

woman to conceive a child she does not wish to love unconditionally and because, for this and other reasons, it is against the welfare of children. Fees for gestational "services" should, in any case, be prohibited, as commercializing basic human relationships.<sup>176</sup>

7. THE RIGHTS OF THE GESTATIONAL MOTHER: The gestational mother, whether or not the genetic mother, should have a *prima facie* right to rear the child. Such rights should not be waivable or terminable until childbirth is past. Where society is unable to prevent the division of gestational from genetic motherhood, the rights of the gestational mother should take precedence over those of the genetic mother, based on the moral priority of *covenant* over *lineage* and the societal importance of the gestational bond.<sup>177</sup>

#### IV. PRACTICAL CONSTRAINTS IN THE CONTEXT OF THE UNITED STATES

Catholic jurisprudential doctrine recognizes that even once a general review of the facts has permitted judgment about the generic requirements of the public order, further prudential assessment is needed to determine what legal forms will most effectively realize the ideal of justice under existing circumstances.<sup>178</sup> Such circumstances have been recognized in Church teaching to include: 1) the requirements of the positive system of law, including the written constitution<sup>179</sup> and the structure of government;<sup>180</sup> 2) the level of voluntary compliance which can be expected, since the law may not make the threat of force its primary ground of effectiveness;<sup>181</sup> and 3) the duty to take into account costs to other rights indirectly caused by enforcement.<sup>182</sup>

#### *Requirements of the Existing Legal System*

As part of the Anglo-American tradition, the United States legal system places great importance on precedent in defining and applying principle.<sup>183</sup> The generic recommendations I have proposed from a Roman Catholic per-

176. The commercialization of basic human procreative and rearing relationships has long been recognized as against public policy. FARNSWORTH, *supra* note 46, at 88.

177. For a general discussion of the moral significance of "covenant" in the context of procreation, see P. RAMSEY, *FABRICATED MAN* 32-42 (1970).

178. JOHN XXIII, *supra* note 4, § 68 at 141.

179. *Id.* § 76 at 143.

180. PASTORAL CONSTITUTION, *supra* note 3, § 74 at 285.

181. JOHN XXIII, *supra* note 4, § 48 at 136.

182. *Id.* § 62 at 139.

183. This is the doctrine of *stare decisis*. See generally, G. CHRISTIE, *Text and Readings on Jurisprudence: The Philosophy of Law* 961-1050 (1973).

spective can influence the shape of civil law only if shown to be supported by United States legal precedents. There are, in fact, ample precedents to support my recommendations in the received law on both families and the practice of medicine, as the New Jersey Supreme Court ruling in the *In re Baby "M"* case showed.<sup>184</sup> The challenge is to show that the case of the new reproductive technologies ought to be decided in continuity with these precedents. Because of the novel appearance of the technologies, the danger exists that lawmakers will depart from the principles embodied in traditional precedent. Since there is doubt about continuity with precedent, legislation, and not just judicial decision, is necessary to ensure that the new case comes into alignment with inherited principles.

A negative precedent of considerable concern is a fifteen year recent history of abortion on demand.<sup>185</sup> As long as this practice cannot be stopped, it is essential that it, at least, be given an interpretation which neutralizes its application in the context of the new reproductive technologies.<sup>186</sup> The public justification, given the nation's present permissive abortion law is the woman's "right" not to continue with the burden of gestation.<sup>187</sup> Even if the precedent is not reversed, all that it should be seen as deciding, for the interim, is that in a conflict, the woman's interest prevails. No express judgment has been made on the child's status.

In order to restrict the impact of the precedent of abortion, care must be given to refuting highly developed alternative interpretations of the abortion precedent, which, at present, are being advanced with an eye toward placing the new reproductive technologies entirely beyond meaningful legal restraint.<sup>188</sup> These interpretations hold that, through *Roe v. Wade* and related decisions, the United States Supreme Court has defined a constitutional "right of procreative autonomy" that prevents any legal interference in human reproductive arrangements.<sup>189</sup> It is argued that this "procreative right" requires the state to enforce third-party contracts for the donation of

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184. *In re Baby "M,"* 14 Fam. L. Rep. 2007 (1988). Such alignment is in order not because the principles are "inherited," but because they are in accord with what experience has shown basic human values require. Legislatures are currently being besieged with numerous conflicting proposals. Note, *supra* note 14, at 188 n.6. It is essential that extended public debate and informed legislative debate precede enactments.

185. Since *Roe v. Wade*, 410 U.S. 113 (1973).

186. Precedents do not apply where the case at hand is distinguishable. In deciding whether cases are distinguishable, the court is necessarily "interpreting" the law with reference to basic societal values. See R. DWORKIN, *LAW'S EMPIRE* 45-86 (1986).

187. See G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 114 (1985).

188. See, e.g., Robertson, *supra* note 6, at 954-67.

189. In addition to *Roe*, other key cases relevant to this line of analysis include: *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

gametes, embryos, gestational "services," and, perhaps, even children.<sup>190</sup> The right may be said to remove eugenic and sex selection procedures from the scope of governmental control, as well as any scientific research on embryos, which may extend the technical scope of the new technologies.<sup>191</sup> In theory, the right may eventually also be extended to prevent the law from interfering with a mother's disposal of an embryo or fetus she has chosen to abort, allowing the commercial sale of fetuses and fetal body parts for organ harvesting.<sup>192</sup>

This alternative interpretation of the abortion precedent capitalizes on the apparent novelty of the new reproductive technologies for the sake of urging the severance of the case from resolution under sound principles embodied in much of traditional family law. It is by a comprehensive ideology that gives the deceptive appearance of easy answers to hard questions. The professional class of lawyers and brokers who stand to gain if procreative and rearing relationships are commercialized is made vulnerable by self-interest to assuming a role as the vehicle which transports this interpretation and ideology into law.<sup>193</sup>

#### *The Necessary Extent of Voluntary Compliance*

A second fundamental circumstance to be considered in shaping specific policy proposals is the extent of voluntary compliance, which a law can be expected to receive. At the present time, conditions are, I believe, favorable for positive steps to reaffirm the centrality of the traditional family.<sup>194</sup> If effective communication is employed, they may also be favorable for eliminating commercialized procreative practices.<sup>195</sup> The entrenched status of AID, the prevalence of single-parent households, and a bias in favor of individual freedom make voluntary compliance with restrictions on noncommercialized donations of third-party gametes, perhaps, less likely.<sup>196</sup>

#### *Indirect Costs*

In framing specific recommendations one final circumstance which must be considered is indirect costs to the rights of third-parties. In the case of

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190. Robertson, *supra* note 6, at 1002-23.

191. *Id.*

192. See generally Andrews, *supra* note 41 (discussing the commercial sale of patient's body parts and products).

193. *Id.* at 961, 977, and 982.

194. The most dramatic contemporary condition is the current epidemic of acquired immune deficiency syndrome ("AIDS"). Consequently, there is the general recommendation that people restrict sexual relations to relationships which are long-term and monogamous.

195. See Krause, *supra* note 17, at 188.

196. Robertson, *supra* note 6, at 1001-02.



the new reproductive technologies, any restraint relying on the use of penalties against parents is likely to do indirect harm to children. It follows that enforcement of restraints in this area should, as a rule, be by means other than penalties against parents. Moreover, any rule placing a gestational mother on the wrong side of the law would make her vulnerable to extortion and "underground" enslavement for the period of her gestation.<sup>197</sup> As a result, enforcement devices should be framed to ensure gestational mothers, regardless of most particular circumstances, with good standing before the law. Penalties should be aimed primarily at third-party brokers and other professionals.<sup>198</sup>

## V. SPECIFIC POLICY RECOMMENDATIONS

The purpose of this article was to justify and prescribe the appropriate scope of the civil law's intervention in the area of the new reproductive technologies. Finally, it aimed to arrive at prescriptions which were concrete and specific. Such prescriptions were to be grounded in broader generic prescriptions justified by reference to Catholic principles on the legitimation of law, as well as in an assessment of relevant practical constraints. The article has set out its generic prescriptions, elaborated their justification under Catholic moral reasoning, and made an assessment of relevant practical constraints. In order to conclude the article, it remains only to state concrete and specific policy prescriptions for the legal response to each of the new reproductive technologies described at the outset of the article.

The specific recommendations which follow are offered to the political community, from the perspective of a particular faith community, Roman Catholicism. Within this faith community, the Sacred Congregation's timely and courageous *Instruction*, referred to several times above, remains the measure of public policy recommendations in this difficult area. In the political community, every proposal, from whatever quarter, obviously needs to be tested for its moral and political wisdom under the circumstances. The concrete recommendations that follow are intended as a point of departure for further reflection and judgment both within the community of faith and the political community at large.

Concretely, the appropriate legal response to each of the relevant new reproductive technologies would appear to be as follows:

1. IVF: In the event that IVF cannot be outlawed, the procedure should

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197. An illustration is available in the case of Alejandra Munoz a Mexican woman who was kept confined in the house of a California sperm donor for the duration of her pregnancy. *Surrogacy Arrangements Act of 1987*, *supra* note 2, (statement of Alejandra Munoz).

198. For reasoning in support of this proposal, see Krause, *supra* note 17, at 200.

be legally restricted to stable married couples who suffer from infertility. No extracorporeal embryo should be created by the process which is not also transferred for gestation. Eugenic and sex selection should be prohibited. Governmental funding should be denied.<sup>199</sup>

2. **SURROGATE EMBRYO TRANSFER:** Surrogate Embryo Transfer should be legally prohibited as the endangerment of an embryo in a "safe haven," and because it undercuts the integral parental role and identity.<sup>200</sup> The prohibition is enforceable because of the necessary mediation of a physician.

3. **ARTIFICIAL INSEMINATION BY DONOR:** State laws existing in about half the states require revision to reflect a change from a contract to an informed consent model.<sup>201</sup> Fees for donation should be prohibited. Eugenic uses, including the Nobel Prize Winners' Sperm Bank, should be outlawed.<sup>202</sup> Disguising a child's lineage should be criminalized. Provision should be made for record maintenance and for screening for diseases. Government funding should be denied.

4. **OVUM DONATION:** The legal treatment of ovum donation should probably be the same as that for AID.<sup>203</sup>

5. **SURROGATE MOTHERHOOD:** Commercial surrogacy should be banned and brokerage and advertising for surrogates should be criminalized. The gestational mother should have an irrebuttable presumption of legal maternity, which should not be subject to waiver until after childbirth has passed. Contracts should be void as against public policy.<sup>204</sup>

6. **GESTATIONAL "SERVICES" WITHOUT GENETIC CONTRIBUTION ("WOMB RENTAL"):** This practice should be prohibited because it undercuts the societal ideal of the integrated parental role and identity. The prohibition is enforceable because of the need for a mediating physician.<sup>205</sup>

7. **EXPERIMENTATION AND TISSUE DONATION:** All nonthera-

199. See notes 161-162 and accompanying text.

200. S. ELIAS & G. ANNAS, *supra* note 5, at 231.

201. Andrews, *supra* note 12, at 54-55 (1984).

202. This sperm bank, founded by Robert Klark Graham, is mentioned in L. ANDREWS, *supra* note 93, at 93.

203. Although physician mediation is required for ovum donation making it feasible to subject the procedure to legal restriction, once AID is tolerated there would not seem to be any reasoned basis for excluding the similar case of ovum donation.

204. For the approach of the New Jersey Supreme Court, see *In re Baby M*, 14 Fam. L. Rep. 2007 (1988).

205. Just as there are limits on the state's ability to enforce the exclusive recognition given to the institution of marriage, there are limits on the state's ability to defend the integrity of the parental role. But, like marriage, the integral parental role merits protection as the societal ideal. In the case of "womb rental," exclusion of the practice would seem to be well within the prudential limits of protection.

peutic experimentation on and tissue donation from human embryos ought to be strictly prohibited, as required by the standard rules on informed consent governing research on and medical treatment of human beings.<sup>206</sup> Important facets of this topic can be expected to come to the United States Congress for review during 1988.<sup>207</sup>

The sale of tissues from dead embryos and fetuses should be prohibited by extension of existing federal law outlawing the sale of human organs.<sup>208</sup> Women who have aborted, parents who have abandoned extracorporeal embryos, and physicians who have assisted in such abortion or abandonment should be denied the right to decide the fate of tissues of embryos and fetuses whose interest they have violated.<sup>209</sup>

8. ARTIFICIAL WOMBS AND ASEXUAL REPRODUCTION: The law should strictly prohibit all means of reproduction which would deprive a child of two genetic parents and the gestational relationship. Governmental funding for development should be denied.<sup>210</sup>

#### CONCLUSION

In connection with the new reproductive technologies, the next decade will decide the law's response to questions of profound significance for basic human values. Like the dilemma of nuclear arms, this moral problem is one of virtually unprecedented and historic proportions. Technological power, in both cases, outspeeds the pace of inherited moral and legal forms. Under the circumstances, moral choices are thrust upon society. These choices need not and ought not, however, to be resolved in a way that denies society its humanity. Properly made, such choices can deepen both society's commitment to the inalienable dignity of the human person and the legitimacy of law as an instrument for serving the common good.

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206. Medical treatment and scientific research may not be imposed on a person without voluntary consent after full disclosure. G. Annas, *Informed Consent*, in ANNUAL REVIEW OF MEDICINE: SELECTED TOPICS IN THE CLINICAL SCIENCES (1978). The embryo and fetus, like the minor suffering from legal incapacity, is not capable of giving the required consent.

207. The three year moratorium on the possibility of governmental waiver on a prohibition of federally funded fetal experimentation under the Health Research Extension Act of 1985 lapses in 1988. 42 U.S.C. § 289(g) (Supp. 1987).

208. See, e.g., National Organ Transplant Act of 1984. 42 U.S.C. 271(e) (Supp. 1987).

209. For reasoning in support of this proposal, see position of Arthur L. Caplan, Director of the Center for Biomedical Ethics at the University of Minnesota. *The Selling of Body Parts*, *supra* note 45, at 33.

210. While the use of artificial wombs would have the potential for rescuing unborn children subjected to abortion or the accident of miscarriage, the development of these means would appear to require research violating the rights and welfare of existing embryos.